

## **REMARKS**

The Examiner is thanked for the performance of a thorough search. By this response, Claims 86–88, 92, and 98 are amended. Claims 90, 91, 99, 133, 134, and 142 are canceled. Claims 172–175 are added. Hence, Claims 86–89, 92–98, 100–132, 135–141, and 143–175 are pending in this application, of which Claims 120–128 and 163–171 are withdrawn.

All issues raised in the Office Action are addressed hereinafter.

### **I. AMENDMENTS/ADDED CLAIMS**

For the convenience of the Examiner, and to expedite prosecution of the claims, Applicants note that Claims 87 and 88 have been amended so as to be in independent form. Claims 87–88 are substantively identical to former Claims 87–88. Claims 87–88, and their dependents, have therefore already been searched and examined. Thus, no new search is required.

Similarly, the only features amended to Claim 86 are features formerly recited, word-for-word, in presently canceled Claims 90 and 91. Meanwhile, Claim 98 has been amended to more clearly recite certain subject matter found in formerly dependent Claim 98, but in independent form. Therefore, the subject matters of both Claim 86 and Claim 98 have already been searched and examined. Thus, no new search is required.

The amendments and added claims therefore add no new subject matter to the claims and are supported by the Specification. The amendments to the claims and the cancelations were made to improve the readability and clarity of the claims and not necessarily for any reason related to patentability.

### **II. ELECTION/RESTRICTIONS**

The Office Action required restriction under 35 U.S.C. § 121. The Office Action identified Claims 86–119, 129–162 as Group I, and Claims 120–128 AND 163–171 as Group II. The Office Action required restriction of the application to Group I or Group II.

Applicants hereby provisionally elect, without traverse, to prosecute the claims of Group I.

### III. CLAIM REJECTIONS BASED ON 35 U.S.C. § 112

Claims 91, 98, 99, 134, 141 and 142 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description. The rejection is respectfully traversed.

#### **CLAIMS 91 AND 134**

Claims 91 and 134 have been canceled, thereby obviating the rejection as to those claims. Removal of the rejection is respectfully requested. However, the allegedly unsupported feature formerly recited in Claim 91 now appears in Claim 86. To clarify the patentability of Claim 86, as amended, Applicants provide the following explanation of how now-canceled Claim 91 is supported by the Specification.

Claim 91 was rejected because, the Office Action alleges, there is no disclosure and/or suggestion in the Specification for “sending a cookie to at least one of the server device or the intercepting device . . . without a user at the client device requesting a new item.” The Office Action supports its allegation by pointing out that the Specification, at page 26, teaches sending a cookie to the server when the user requests a new page.

It is true that, on page 26, Applicants teach an “embodiment” of the invention in which “the cookie is sent to the server at some later time, such as when the user requests a new page from the server.” However, this embodiment, which Applicants refer to as “lazy reporting,” is but one embodiment. Applicants disclose other embodiments that utilize other techniques of sending the cookie to the server, including “without a user at the client device requesting a new item.”

One such embodiment is described in the exact same paragraph of page 26 as “lazy reporting.” That is, the instrumentation code executed by the web browser in step 434 includes code that causes the web browser to request a dummy image file from the server. This request “causes the web browser to send the cookie with the performance measurements automatically to the server.” This embodiment, as one skilled in the art would recognize, does not involve a user

sending a request for a new item. It is **the code inserted into the original item, not the user**, that **causes the browser to automatically send the cookie with a request** for an image. *See also, e.g.*, pages 44 and 45.

For at least these reasons, the Specification adequately describes “sending a cookie to at least one of the server device or the intercepting device . . . **without a user** at the client device requesting a **new item**.”

### CLAIMS 98 AND 141

Claim 98 was rejected because, the Office Action alleges, “there is simply no teaching and/or suggestion in the original specification” for the step of “while loading the modified initial item, determining that the client device does not store data indicating a request time for the initial item.” The Office Action is mistaken.

The Office Action acknowledges that there is support for determining whether a cookie exists for an application in page 38, lines 15–26, but fails to see the relevance of this disclosure to the recited step. The relevance of this disclosure is that the instrumented cookie comprises “data indicating a request time for the initial item.” *See, e.g.*, page 19 (“the submit time and load time and counter value measurements are stored in a preference file also called a cookie”); page 22 (“In step 404 the current time is determined. The current time is used to define the time when the request for a service is initiated, as part of the measurement of the response time. In step 406 performance measures related to submit events are stored in a data structure in memory or in persistent storage. For example, the current time is stored in a cookie as the submit time.”).

Thus, one skilled in the art would understand that the cookie described on page 38 comprises “data indicating a request time for [an] item.” Since page 38 teaches a step of determining, while a page is loading, that the client does not store a cookie for the application, page 38 therefore teaches “while loading the modified initial item, determining that the client device does not store data indicating a request time for the initial item.”

Moreover, this feature of Claim 98 is again disclosed on page 41, lines 5–14.

For at least these reasons, the Specification adequately describes the method of Claim 98 and its dependent claim 141. Removal of the rejection is respectfully requested.

## CLAIMS 99 AND 142

Claims 99 and 142 have been canceled, thereby obviating the rejection as to those claims. Removal of the rejection is respectfully requested.

### IV. CLAIM REJECTIONS BASED ON 35 U.S.C. § 103

#### A. *Elnozahy and Russell*

Claims 86-87, 95-98, 100-108, 111-116, 118-119, 129-130, 138-141, 143-151, 154-159 and 161-162 were rejected under 35 U.S.C. § 103 as allegedly unpatentable over *Elnozahy et al.*, U.S. Patent No. 6,792,459 B2 (hereinafter “*Elnozahy*”), in view of *Russell et al.*, U.S. 2002/0099818 A1 (hereinafter “*Russell*”). Applicants traverse the rejection. Reconsideration is respectfully requested.

#### CLAIM 86

Claim 86, as presently amended, recites among other features:

wherein sending the cookie to at least one of the server device or  
the intercepting device occurs without a user at the client  
device requesting a new item.

As the Office Action has previously admitted in its analysis of presently canceled Claim 91, which included the above step verbatim, neither *Elnozahy* nor *Russell* teaches such a step. Thus, the combination of *Elnozahy* and *Russell* does not teach or suggest the method of Claim 86.

The Office Action rejected presently canceled Claim 91 under 35 U.S.C. § 103 based on other grounds. As Applicants shall discuss in section B below, the Office Action was mistaken in its rejection. The cited references do not teach or suggest “wherein sending the cookie to at least one of the server device or the intercepting device occurs without a user at the client device requesting a new item.” For at least this reason, Claim 86 recites patentable subject matter. Therefore, Applicants respectfully request removal of the rejection as to Claim 86.

### CLAIM 87

Claim 87 recites, among other elements:

measuring a number of events, the events including at least a plurality of cursor events, focus events, or change events.

For instance, a computer may implement the method of Claim 87 to measure the number of mouse movements between the time a page is loaded and the time a next page is loaded. This information may be useful for many reasons, including providing an application developer with feedback regarding the complexity of the page.

The Office Action alleges that *Elnozahy* teaches such a step in col. 4, lines 33–59, col. 6, lines 10–20, and col. 7, lines 1–46. The Office Action is mistaken. In each of these passages, *Elnozahy* teaches that a script that measures performance may be executed **in response** to click events. *See* col. 4, lines 36–38 (“authors may attach a script . . . such that it gets executed every time a specific event occurs”); col. 6, lines 14–15 (“scripts 210–230 are executed in response to certain events”); col. 6 lines 47–55 (scripts 210–230 comprise “instructions for measuring response time,” “measuring instructions,” and “reporting instructions”); and col. 7 (describing exactly how the scripts measure response time in response to user clicking a link). By contrast, Claim 87 recites that the measure is “**of**” the events themselves. So, for example, while *Elnozahy* teaches to **measure metrics such as response time in response to a number of clicks**, one implementing the method of Claim 87 might **measure the actual number of clicks**. *See, e.g.*, Applicants Specification at page 28. There is a clear difference between the two techniques—measuring performance in response to an event is not the same thing as “measuring a number of events.”

Nor is there any hint in *Elnozahy* that the subject of the measurements taken in response to a click is the click itself. *Elnozahy* describes a variety of response-time related performance metrics, *e.g.* *Elnozahy* at col. 2, lines 55–60, but not once does *Elnozahy* even hint at the desirability of using events such as “cursor events, focus events, or change events” as a performance metric.

Furthermore, *Russell* does not teach, nor is alleged to teach, “measuring a number of events, the events including at least a plurality of cursor events, focus events, or change events.”

Therefore, for at least the foregoing reasons, the combination of *Elnozahy* and *Russell* fails to teach or suggest at least one feature of independent Claim 87. The combination of *Elnozahy* and *Russell* does not render Claim 87 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.

### **CLAIM 98**

Claim 98, as amended, recites among other elements:

- at an intercepting process executing on either an intercepting device or a server device;
- intercepting an item in transit from the server process to the client device, prior to the arrival of the item at the client device;
- based on the item, generating a modified item by modifying the item to include initial code which causes one or more processors on the client device to perform the steps of, while loading the modified item:
- determining that the client device does not store data indicating a request time for the item, the request time being a time at which the item was requested;
- in response to determining that the client device does not store data indicating a request time for the item, constructing a page to be loaded at the client device in place of the modified item, said page being different than the modified item, wherein the page includes code that causes the one or more processors on the client device to perform the steps of:
- automatically requesting the item from one of the server device or the intercepting device;
- recording data indicating a time at which the item was requested.

The method of Claim 98 is useful for, among other purposes, determining a response time for loading the first page that a client requests from a website. As discussed in Applicants' specification at pages 37–38, the first time a client requests an item from a website, the client will not have a cookie for the website. According to several of the embodiments disclosed in the Specification, the client can only determine a response time for a page if the client already has a

cookie with data indicating the request time for that item. Since no such cookie exists when the client requests the first item, the client is unable to calculate a response time for the first page.

Among other effects, Claim 98 allows for computation of a response time for the first item by modifying the first item to include code which causes the client to determine whether or not a cookie exists. If a cookie does not exist, the code causes the client to load a page—for example, a “dummy page”—in place of the item, re-request the first item, and store a cookie with data indicating the time at which the first item was re-requested. When the first item is returned to client after the second request, the client will have data indicating the request time, and thus be able to calculate a request time.

The Office Action alleges that such a method is disclosed by the cited references, in part, because *Elzonahy* allegedly teaches instrumenting an item with “code that causes the one or more processors . . . to perform the step[] of automatically requesting the item . . . .” Specifically, the Office Action alleges that such a step is taught in *Elzonahy* at col. 5, lines 9–41, col. 7, lines 1–30, and col. 8, lines 55–57. The Office Action is mistaken.

Not only is the Office Action’s explanation of how these passages are alleged to teach the above-quoted step vague and unclear, it is quite clear that the passages do not teach such a step. The **only instrumented code** discussed in these passages is for **measuring response time, not “requesting [an] item.”** Moreover, in order to teach the method of Claim 98, given that *Elzonahy*’s instrumented web pages are alleged to correspond to the items and the modified items of Applicants’ claims, *Elzonahy* would have to teach that one should **modify a web page so that the web page includes code to automatically re-request that very same web page.** *Elzonahy* suggests no such feature.

In fact, *Elzonahy* suggests that his invention is entirely incapable of measuring the response time of a first page—i.e. a page for which no data indicating a request time exists at the client. *Elzonahy* classifies web page visits into two distinct categories. One category is for “instrumented entry”—i.e. visits resulting from the user clicking on an “instrumented link from another page within [the website].” *Elzonahy* at col. 5, lines 10–13. The second category is for “outside entry”—i.e. visits resulting from a user following a link from a non-instrumented page outside of the website. *Id.* at col. 5, lines 13–16. For the latter category, because the previous

page was not instrumented, the client would be unable to store data indicating the request time for a web page.

While *Elzonahy* states that “**the response time is determined for all instrumented entries** to HTML pages [at a website]”—i.e. pages that are not the first page visited by the user and thus contain data indicating the request time—*Elzonahy* is **entirely silent regarding the determination of a response time for outside entry**—i.e. pages for which the client does not store data indicating the request time. *Elzonahy* at col. 5, lines 26–27. Thus, *Elzonahy* fails to teach any method similar to that of Claim 98.

Furthermore, *Russell* does not teach, nor is alleged to teach, instrumenting an item with “code that causes the one or more processors . . . to perform the step[] of automatically requesting the item . . . .” Therefore, for at least the foregoing reasons, the combination of *Elnozahy* and *Russell* fails to teach or suggest at least one feature of independent Claim 98. The combination of *Elnozahy* and *Russell* does not render Claim 98 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.

### CLAIM 101

Claim 101 recites, among other features, “at the intercepting process: **determining a percentage of total items sent to the client process that are to be modified.**” The Office Action alleges that such a feature is taught in *Russell* at ¶ [0089]. The Office Action is mistaken.

While *Russell* may teach determining a percentage of items for which to collect and transfer measurement data, **this determination does not extend to determining whether or not to modify an item.** Rather, in *Russell*, one skilled in the art would be left to believe that all items are modified, and that the “probability function” is applied either by the client device when deciding whether or not to collect and report data, or by the server monitor when deciding whether to keep or discard reported data.

Furthermore, *Elzonahy* does not teach, nor is alleged to teach, this step of Claim 101. Therefore, for at least the foregoing reasons, the combination of *Elnozahy* and *Russell* fails to teach or suggest at least one feature of Claim 101. The combination of *Elnozahy* and *Russell* does not render Claim 101 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.



### CLAIM 106

Claim 106 presently recites, among other elements: “sending the notification message to a user of the client process.” The Office Action admits that neither *Elnozahy* nor *Russell* teaches such a step. Nonetheless, the Office Action alleges that such a step “would have been obvious to a person of ordinary skilled in the art.”

The rejection is legally improper for at least the reason that this allegation is a **mere conclusory statement without any evidentiary support**. Applicants respectfully request that the Office provide evidentiary support for its allegation.

For at least the foregoing reason, the combination of *Elnozahy* and *Russell* fails to teach or suggest at least one feature of Claim 106. Therefore, the combination of *Elnozahy* and *Russell* does not render Claim 106 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.

### THE REMAINING DEPENDENT CLAIMS

Each of the remaining dependent claims 95-97, 100-108, 111-116, 118-119, 129-130, 138-141, 143-151, 154-159 and 161-162 that are not discussed above is patentable for at least the same reasons as independent Claims 86, 87 or 98. Additionally, each of the dependent claims recites at least one additional feature that independently renders it patentable over the cited references. However, to expedite prosecution in light of the fundamental differences already identified, further arguments for each independently patentable feature of 95-97, 100-108, 111-116, 118-119, 129-130, 138-141, 143-151, 154-159 and 161-162 are not provided at this time. Applicants reserve the right to further point out the differences between the cited art and the novel features recited in the dependent claims.

#### ***B. Elnozahy, Russell, and “Official Notice”***

Claims 88–94 and 131–137 were each rejected under 35 U.S.C. § 103 as allegedly unpatentable over *Elnozahy*, in view of *Russell*, and further in view of various Official Notices. Applicants traverse the rejection. Reconsideration is respectfully requested.

As a preliminary matter, Applicants traverse the Official Notices. Official Notice is allowed only under limited circumstances for facts beyond the record which are "capable of such

instant and unquestionable demonstration as to defy dispute." *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970). As discussed below, Applicants are aware of no prior art that teaches or suggests the steps for which the Official Notices are given. Nor are Applicants aware of any technical reasons or other information that establishes that the subject matters of the Official Notices is "capable of such instant and unquestionable demonstration as to defy dispute." Applicants respectfully request that the Office provide evidentiary support for each of the Official Notices.

### CLAIM 88

With respect to Claim 88, the Office Action admits that neither *Elnozahy* nor *Russell* teaches or suggests "sending a request for a revised item and receiving the revised item." Nonetheless, the Office Action alleges that Claim 88 is obvious because, it alleges, "sending a request for a revised item and receiving the revised item is fairly well known in the art." The Official Notice is mistaken. Applicants are aware of no prior art that teaches or suggests "sending a request for a revised item and receiving the revised item."

Moreover, Claim 88 does not simply recite the idea of "sending a request for a revised item and receiving the revised item." Rather, Claim 88 recites, among other features:

at an intercepting process . . . modifying [an] item to include code  
which causes . . . the client device to perform the steps of . .  
. in response to determining that [a] measured performance  
is below a threshold of minimum performance, sending a  
request . . . for a revised item.

Even if the step of "sending a request for a revised item and receiving the revised item" were obvious, which it is not, the method of Claim 88 would not be obvious because it would not be obvious to modify an intercepted item to include code that causes a client device to, in response to detecting performance below a threshold, send a request for a revised item.

For at least the foregoing reason, the combination of *Elnozahy*, *Russell*, and the Official Notice fails to teach or suggest at least one feature of Claim 106. Therefore, the combination of *Elnozahy*, *Russell*, and the Official Notice does not render Claim 106 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.

### CLAIM 91

With respect to Claim 91, the Office Action admits that neither *Elnozahy* nor *Russell* teaches or suggests “sending the cookie to at least one of the server device or the intercepting device occurs without a user at the client device requesting a new item.” Nonetheless, the Office Action alleges that Claim 91 is obvious because, it alleges, the step is “known in the art” and “this is how cookies work.” The Official Notice is mistaken. Applicants are aware of no prior art that teaches or suggests “sending the cookie to at least one of the server device or the intercepting device occurs without a user at the client device requesting a new item.”

In fact, in spite the Office Action’s insistence to the contrary, **this is not how cookies work**. See, e.g., <http://computer.howstuffworks.com/cookie2.htm>. A website does not “send its own cookie,” as alleged by the Office Action. Rather the cookie sits on the client device, and is only communicated to the server with requests from the client browser.

Moreover, Applicants do not broadly claim the step of “sending the cookie to at least one of the server device or the intercepting device occurs without a user at the client device requesting a new item.” Rather, Applicants claim a step of modifying an intercepted item to include code that causes a client device to send measurement data via a cookie, “without a user at the client device requesting a new item.” Such a step would not have occurred to one skilled in the art, as evidenced by the fact that neither *Elnozahy* and *Russell* contemplate the use of such a step, in spite of the fact that the step would solve a problem in both *Elnozahy* and *Russell*’s invention—that is, without the step, neither *Elnozahy* and *Russell* provide a way for reporting measurement data when the user stops browsing a website without moving to a new page.

Nonetheless, Claim 91 is presently canceled, thereby obviating the rejection as to Claim 91. Removal of the rejection as to Claim 91 is therefore respectfully requested. Moreover, present Claim 86, into which the above-quote language of 86 has been moved, is patentable over the combination of *Elnozahy*, *Russell*, and the Official Notice for at least the reasons described above.

### CLAIM 92

Claim 92 presently recites, among other elements:

said step of measuring performance further comprise[s]:  
requesting an image file from one of the intercepting device or the  
server device;  
wherein sending the cookie to at least one of the server device or  
the intercepting device occurs as a consequence of  
requesting the image file from one of the intercepting  
device or the server device

Among other purposes, Claim 92 allows for the reporting of measurement data without the user having to request a new item. By inserting into a web page code that causes the client to request an image file—after, for instance, all of the elements in a web page have loaded—the intercepting process facilitates the client device sending a cookie with the collected measurement data for that web page.

The Office Action alleges that such a step is taught in *Elnozahy* at col. 9, lines 27–43 and col. 8, lines 58–67. The Office Action is clearly in error. There is **absolutely no support** for the Office Action’s allegation in the cited passages or in any other passage of *Elnozahy*. **In fact, the cited passages fail to even include the words “image” or “file.”** Should the Office persist in the rejection of these elements of Claim 92 based on *Elnozahy*, Applicants respectfully request that the Office specifically identify how the cited passages are alleged to teach the above-quoted step.

For at least the foregoing reason, the combination of *Elnozahy*, *Russell*, and the Official Notice fails to teach or suggest at least one feature of Claim 92. Therefore, the combination of *Elnozahy*, *Russell*, and the Official Notice does not render Claim 92 obvious under 35 U.S.C. § 103. Reconsideration is respectfully requested.

### THE REMAINING DEPENDENT CLAIMS

Each of the remaining dependent claims 89–94 and 131–137 that are not discussed above is patentable for at least the same reasons as independent Claims 86 and 88. Additionally, each of the dependent claims recites at least one additional feature that independently renders it patentable over the cited references. However, to expedite prosecution in light of the fundamental differences already identified, further arguments for each independently patentable feature of Claims 89–94 and 131–137 are not provided at this time. Applicants reserve the right

to further point out the differences between the cited art and the novel features recited in the dependent claims.

**C. Elnozahy, Russell, and Peiffer**

Claims 99 and 142 were rejected under 35 U.S.C. § 103 as allegedly unpatentable over *Elnozahy*, in view of *Russell*, and further in view of Peiffer et al., U.S. Patent No. 6,834,297 B1 (hereinafter “*Peiffer*”). Applicants traverse the rejection. However, in the interest of expediting prosecution, Claims 99 and 142 are presently canceled, thereby obviating the rejection. Removal of the rejection is requested.

**D. Elnozahy, Russell, and Guthrie**

Claims 109, 110, 117, 152-153 and 160 were rejected under 35 U.S.C. § 103 as allegedly unpatentable over *Elnozahy*, in view of *Russell*, and further in view of Guthrie, U.S. Patent No. 6,266,681 B1 (hereinafter “*Guthrie*”). Applicants traverse the rejection. Reconsideration is respectfully requested.

Claims 109, 110, 117, 152-153 and 160 are patentable for at least the same reasons that independent Claim 86, from which Claims 109, 110, 117, 152-153 and 160 depend, are patentable over the combination *Elnozahy* and *Russell*. The features missing of independent Claim 86 that are missing from *Elnozahy* and *Russell* are also not found, nor alleged to be found, in *Guthrie*. The combination of *Elnozahy*, *Russell*, and *Guthrie* does not disclose Claims 109, 110, 117, 152-153 and 160 for at least the reason that the combination does not disclose those missing features of Claim 86 that are included in Claims 109, 110, 117, 152-153 and 160 by dependency.

Additionally, each of the dependent claims recites at least one additional feature that independently renders it patentable over the cited references. However, to expedite prosecution in light of the fundamental differences already identified, further arguments for each independently patentable feature of Claims 109, 110, 117, 152-153 and 160 are not provided at this time. Applicants reserve the right to further point out the differences between the cited art and the novel features recited in the dependent claims.

V. CONCLUSION

For the reasons set forth above, all of the pending claims are now in condition for allowance. The Examiner is respectfully requested to contact the undersigned by telephone relating to any issue that would advance examination of the present application.

A petition for extension of time, to the extent necessary to make this reply timely filed, is hereby made. If any applicable fee is missing or insufficient, throughout the pendency of this application, the Commissioner is hereby authorized to any applicable fees and to credit any overpayments to our Deposit Account No. 50-1302.

Respectfully submitted,  
HICKMAN PALERMO TRUONG & BECKER LLP

Date: December 10, 2008

/KarlTRees#58983/

Karl T. Rees, Reg. No. 58,983

2055 Gateway Place, Suite 550  
San Jose, CA 95110  
(408) 414-1233  
Facsimile: (408) 414-1076